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## **“Analysing the Implications and Scope of Judicial Impact Assessment in the Indian Context”**

**Maria Devi**

*Indian Law Institute, New Delhi.*

*mariadevi276@gmail.com*

**Sunidhi Prasad**

*Indian Law Institute, New Delhi.*

*sunidhisinha212@gmail.com*

**Yashraj**

*Indian Law Institute, New Delhi.*

*rajyash1225@gmail.com*

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### **ABSTRACT**

Time and again there are a number of debates on why the judicial reforms must be made to ensure efficient justice and remove the delays that are caused due to the stacking up of pending cases.

The obvious question is there a way to solve this issue? Should the number of judges be increased or should the number of courts be increased to meet the demand for speedy and efficient justice, the right to which our constitution guarantees? The resource allocation done to the judiciary is, as compared to other sovereign state functions, is insufficient and less, done mostly by the State Governments which themselves do not have sufficient discretion to allocate funds in the centrally sponsored schemes of Union Government which is why we are currently deliberating on an important term- “Judicial Impact Assessment”.

In the entire analysis of Judicial Impact Assessment, we will assess the utility and essentiality of Judicial Impact Assessment, in special reference to India and U.S., it is also important to assess whether Judicial Impact Assessment in itself is relevant and feasible in Indian context.

**Keywords:** *Judicial Delays, Socio-Legal Research, Judicial Data Grid, Impact of Legislation.*

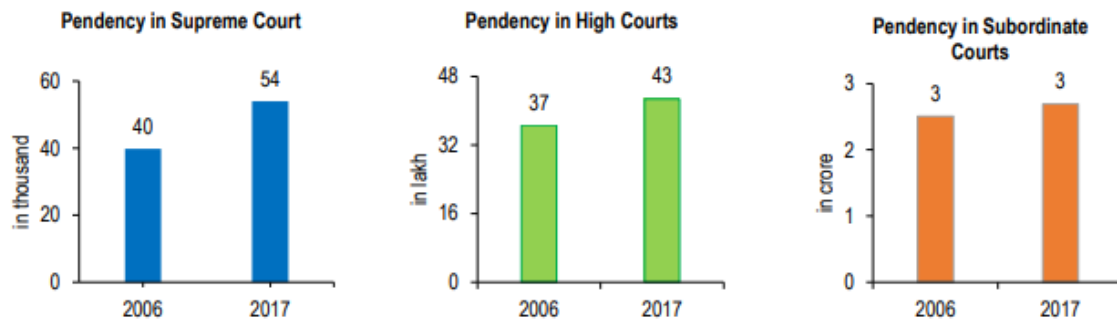
## 1. INTRODUCTION

*“Judicial Impact Assessment is a process whereby the government can anticipate the likely cost of implementing a legislation through the courts and help deliver timely justice to litigants.”*

- N.R. Madhava Menon (Former Director of the National Judicial Academy at Bhopal)<sup>1</sup>

In India, the judicial system encounters an increasing menace of pending cases which are mounting up and paralysing the justice delivery system. Justice delayed is justice denied but the judicial mechanism seems inefficiently tuned to deal with the plethora of cases our courts encounter. Speedy justice is a fundamental right under article 21 of the constitution but the delays in justice and the long process of trials have shaken the trust of people in the justice delivery system.

### Pendency in courts has increased over the years; 86% of cases in the subordinate courts



Note: Data for 2017 includes data up to April 2018.

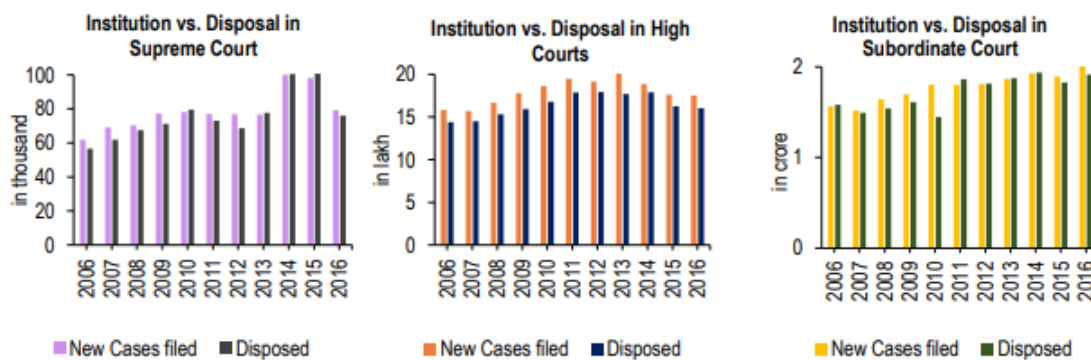
Figure 1. A look at the increasing incidence of pendency of cases<sup>2</sup>

<sup>1</sup>JUDICIAL IMPACT ASSESSMENT : ARTICLE, available at: <https://indianlegalsolution.com/judicial-impact-assessment-article/> (last modified on July 4 2019).

<sup>2</sup> Vital Stats Pendency of cases in the judiciary available at: [https://www.prsindia.org/sites/default/files/parliament\\_or\\_policy\\_pdfs/Vital%20Stats%20-%20Pendency%20and%20Vacancies%20-Roshni%20-%20250718For%20Upload.pdf](https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Vital%20Stats%20-%20Pendency%20and%20Vacancies%20-Roshni%20-%20250718For%20Upload.pdf) (last visited on Oct.29,2019).

The World Justice Project in 2018 put the number of pending cases at three billion. And the Rule of Law Index places India at 63 out of 113 countries. Roughly estimating, there are about 3 crore pending cases in the country, affecting some 30 crore people. Accounting for the unreported and unrecorded cases, this number may add up to another 20 crores. Besides, a declining trend in civil litigation in India is cause of worry as this suggests that the people are not turning to courts for their justice needs in civil matters.<sup>3</sup>

**Disposal rate between 28% and 55%; increasing number of new cases/year add to pendency**



2.

**Figure 2. Disposal rate of cases: comparative analysis over the years<sup>4</sup>**

It is not just the fact that despite the increase in rate of disposal of cases, the number of cases of unmet justice is on an increasing trend but also the fact that resource allocation to judiciary is also significantly low. The Plan investment on Judiciary did not exceed 0.07 per cent of the total Plan outlay.<sup>5</sup>

The infrastructure, the mechanism of judiciary, the structural and procedural aspects therein forming part of the mechanism is surprisingly incompetent to address the concern of judicial reforms. Judiciary is generating a huge ton of data every year but the data so collected or not has never been processed to analyse the trend of cases, litigant behaviour, impact and consequences of judicial decisions. This is why we are now discussing judicial impact assessment.

<sup>3</sup>G.S.Bajpayee, “The judicial impact needs an urgent assessment”, *Hindustan Times*, Mar. 22, 2019.

<sup>4</sup>*Supra* note 1.

<sup>5</sup> N.R. Madhava Menon, “Judicial impact assessment and timely delivery of justice”, *The Hindu*, Oct. 9, 2016.

Judicial Impact Assessment is a scientific tool which addresses the exact problem of measuring the impact of legislations, old and new, the trend of cases, the change in workload of judiciary with every new amendment and legislation and the budgetary allocation in an efficient mechanism to ensure the independence of judiciary.

It is important to understand why judicial impact assessment at all is needed in the Indian legal system. In *Salem Advocates Bar Association v. Union of India*<sup>6</sup>, Supreme Court, in its order, for the first time, addressed the need for creation of a task force to be constituted by the Government of India to assess the impact of different legislations on the judicial system.

## 2. WHAT IS JUDICIAL IMPACT ASSESSMENT

Judicial impact assessment is a socio-legal research tool, which scientifically analyses data from the judicial system to estimate the change in workload in the form of judicial costs and manpower requirement due to every new legislative enactment. The change in workload may be objective or substantive and hence, it is important to estimate what will be the impact of these changes.

If we look from the perspective of quantitative analysis, operational changes can be easily measured but to assess the substantive changes is difficult as the consequences of such a change depends on the socio-economic matrix on which the change actually takes place. The question is why at all is there a need for understanding the change in workload of judiciary with every new legislation? The answer is obvious from the point of view of rationality.

The problem of court congestion is very widely recognised and various reports such as the Justice Satish Chandra Committee Report<sup>7</sup>, the Malimath Committee Report<sup>8</sup> try to deal extensively to reduce the number of litigations through judicial reforms.<sup>9</sup> The problem clearly is of statistics. For every legislation, there are new cases and for every case there is the requirement of judicial staff

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<sup>6</sup> (2005) 6 SCC 344.

<sup>7</sup> Relevant extracts of this Report are available in the Appendix-I: Centre for Research & Planning, Supreme Court of India, "Subordinate courts of India: A Report on access to justice 2016" X-90-94 (2016).

<sup>8</sup> Government of India, Ministry of Home Affairs, "Committee on Reforms of Criminal Justice System" 253-58 (2003).

<sup>9</sup>The Problem Of Court Congestion: Evidence From Indian Lower Courts, *available at* : [https://www.researchgate.net/publication/23516463\\_The\\_Problem\\_Of\\_Court\\_Congestion\\_Evidence\\_From\\_Indian\\_Lower\\_Courts](https://www.researchgate.net/publication/23516463_The_Problem_Of_Court_Congestion_Evidence_From_Indian_Lower_Courts) (last visited on Oct. 30,2019).

and judges. There is a further requirement to assess whether the existing budgetary allocation done, although maybe sufficient but is it efficiently employed in the court infrastructure for the advancement of justice along with the litigation trend analysis.

Judicial impact assessment forms the basis of such assessment where the relevant data is analysed to bring about meaningful and powerful results. The periodic assessment of consequences of judicial decisions can help evaluate the establishment costs, dockets, personnel requirements and caseloads.

### 3. WHAT IS THE NEED FOR JUDICIAL IMPACT ASSESSMENT

Socio-legal research has always been an under-estimated topic. Our academicians and scholars have often ignored the benefits and implications of what a socio-legal research may produce if effectively pursued to address socio-economic and legal causes. Thus, socio-legal research remains an unknown and un-pursued subject.

Even more interestingly, when the Ministry Of Law And Justice in India was asked to state as to why no action has been taken by the Government of India on the issue of Judicial Impact Assessment, the answer simply cited by the ministry is that the Committee of Experts constituted to assess the practicality of implementation of the Justice M. Jagannadha Rao committee report submitted that there were practical difficulties in estimating Judicial Impact Assessment and that the same was neither feasible nor desirable in Indian context<sup>10</sup>. There has not been any reasoning given as to why the same is provided for nor any scope of further explanation.

For a long time, there has been a need to understand how sentencing discretion in criminal cases impact the offender and due to lack of impact studies locally, the criminal courts have borrowed, rather unsuccessfully from the western estimates of impact assessment of different punishments on different categories of offenses.<sup>11</sup>

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<sup>10</sup> Government of India, Ministry of Law and Justice, answered on Judicial Impact Assessment, Question no. 2458, available at:

<http://164.100.47.194/Loksabha/Members/QResult16.aspx?qref=75718> (last modified on Dec.26, 2018)>.

<sup>11</sup>N.R.Madhava, "Law Impact Assessment", National Seminar on Law Impact Assessment, Held on Nirma University Institute of Law , Ahemdabad on Jan. 21, 2011, available at:

<https://heinonline.org/HOL/Page?handle=hein.journals/nulj1&id=7&collection=journals&index=>> (last visited on Oct. 29, 2019).

The 120<sup>th</sup> Law Commission Report on ‘Manpower Planning In The Judiciary: A Blueprint’<sup>[3]</sup> and the 127<sup>th</sup> Law Commission Report on ‘Resource Allocation for Infra-structural Services in Judicial Administration’<sup>12</sup> provides an estimate of how both insufficient staffing, unfilled judicial vacancies and unstructured budgetary allocation have created a lacuna in the judicial system.

Here are five enumerated reasons as to why Judicial Impact Assessment is a vital necessity<sup>13</sup>:

- 1) The objectives of law are provided in the preamble and its structure but there exists no way to estimate the way these objectives are actually being met. There are various stakeholders who get affected by every judicial decision which has several consequences along with alternative courses of action but there exists no mechanism to measure or estimate their consequences.
- 2) The impact of Supreme Court decisions is important to understand the specific and general implications of the judicial decisions on the individuals, institutions and society.
- 3) An amendment in law can have a huge and irreversible impact on the concerned stakeholders and can open up an entire new era of cases in that specific subject which increases the cost burden on judiciary. The manpower and finance required for the same must be assessed through a mechanism which is completely absent.
- 4) Law affects the society but there is apparently no way of actually knowing whether the public expectations out of law are being met or not.
- 5) The trend of litigation and changes in the society are completely unregistered and unaccounted for, the data being such that has never been processed. Knowing this trend could be instrumental in creating an efficient legal machinery and even legislations.

Judicial Impact Assessment pertains to a quintessential requirement that no central laws, whether made in list I or list II be made without proving the state government necessary machinery to implement these laws (financial assistance and respective resource base), this being an obvious rationale.<sup>14</sup>

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<sup>12</sup> Law Commission of India. ,” One Hundred Twenty-Seventh Report on Resource Allocation for Infra-structural Services in Judicial Administration” (Ministry of Home Affairs ,1988), *available at*: <<http://lawcommissionofindia.nic.in/101-169/Report127.pdf> (last visited on Oct. 29, 2019)>.

<sup>13</sup>*Supra* note 6.

<sup>14</sup>*Supra* note 8.

#### 4. JUDICIAL IMPACT ASSESSMENT IN THE U.S.

In the U.S. the need for judicial impact assessment was first advocated by Warren Burger, who was the then Chief Justice of United States. He pointed out “the need for rational planning for the future with regard to burdens of the court” while addressing state of the Judiciary in 1972. Thereafter, various advancements were made to this effect viz. the Congressional Budget Office established for the purpose of assessing the increase or decrease in court’s burden from the legislations enacted and National Research Council established to assess the change in court’s workload with new legislations. In 1990, the Federal Courts Study Committee created by Congress recommended the creation of a Judicial Impact Assessment Office in the judicial branch.

The American Bar Association also passed a resolution in 1991 calling upon each State legislature and the United States Congress to mandate by legislation, the preparation of Judicial System Impact Statements to be attached to each Bill or Resolution that affects the operations of State or Federal courts; and also to establish a mechanism within its budgeting process to prepare Judicial System Impact Statements determining the probable costs and effects of each Bill or Resolution that has an identifiable and measurable effect on the dockets, work loads, efficiency, staff and personnel requirements, operating resources and currently existing material resources of appellate, trial and administrative law courts.

A very important point here to be considered is the fact that from the Congressional Budget Office, it took U.S. 20 years and a dedicated staff to collect data for the preliminary fiscal estimates of the Judicial Impact Assessment<sup>[4]</sup>. Also noteworthy is the conclusion drawn by the National Research Council which decided that it is indeed not feasible to collect data for each and every new legislation and determine its impact on the judiciary but it is feasible to collect data regarding certain specific cases, viz. procedural changes brought about by selected legislations and their impact on the judiciary.

It is in light of these developments that we now focus on the Indian perspective of Judicial Impact Assessment.

## 5. THE INDIAN PERSPECTIVE

Every new legislation, the impact on State Courts is tremendous as the administration of justice, constitution and organisation of all courts except for the Supreme Court and High Courts falls under Entry 11 of the Concurrent List<sup>15</sup>.

Article 117(3)<sup>16</sup> puts an important requirement that a bill cannot be passed by either house which involves expenditure from the consolidated fund of India unless the President's assent is obtained wherein the bill involves expenditure from the Consolidated Fund of India<sup>17</sup>. This is a form of constitutional safeguard. However, apart from this, under Rules of Procedure and Practice of Business in the Lok Sabha and the Rajya Sabha, every bill must be accompanied by a financial memorandum proposing the recurring and non-recurring expenditure to be incurred from the Consolidated Fund of India if the bill is enacted but if the bill does not draw funds from the Consolidated Fund of India, it does not require any such account which will thus completely ignore the litigation expense incurred by the State Governments due to such enactments.

Under article 207(3)<sup>18</sup> of the constitution, a similar provision is made for the State Legislative enactments. The issue is that even if the safeguards like article 117(3) and article 207(3) exist, there is hardly any effort by the Ministries to assess the impact on courts and judicial legislations as a result of such enactments. There is thus, a dire need to be able to set a statistical estimate of the burden of litigation and court expenses given that these legislative enactments come into operation.

It is here that we propose an important development that can likely help in our endeavour to truly reform judiciary using the already existing instruments and resources that we have recently developed.

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<sup>15</sup> The Constitution of India, Entry 11-A of Concurrent List states:

11. Administrators-general and official trustees.

[11-A. Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts.

This was inserted by the Constitution (Forty-second Amendment) Act, 1976, s. 57 (w.e.f. 3-1-1977)].

<sup>16</sup> The Constitution of India, art.117(3).

<sup>17</sup>Consolidated Fund of India is an indispensable financial account of government financing. Both revenues and expenses transacted by the government become a part of this account, excluding, however, the exceptional expenses met by either the Contingency Fund or the Public Account. Unless parliamentary approval to this regard is obtained, no money can be withdrawn from this account which ensures greater transparency of this financing system.

<sup>18</sup> The Constitution of India, art.207(3).



The National Judicial Data Grid (NJDG) is a part of the on-going e-Courts Integrated Mission Mode Project. NJDG will work as a monitoring tool to identify, manage & reduce pendency of cases. It will also help to provide timely inputs for making policy decisions to reduce delay and arrears in the system, facilitate better monitoring of court performance and systemic bottlenecks, and, thus, facilitate better resource management. The NJDG will cover all categories of cases, including those relating to juvenile justice system. The NJDG is being implemented on a pilot basis in the current financial year 2013-14.<sup>19</sup>

This development is of great importance as it theoretically makes it possible to study the Judicial Impact Assessment as it records enactments, the cause of action of which arises at the district level. This data can be used to assess the impact of legislations on the courts and the litigations which thus arise.

## 6. WAY FORWARD FOR INDIAN JUDICIARY

It is important for us to realise that improving court efficiency and access to justice will not simply improve by deploying more resources or increasing the number of computers or judges for the judiciary. The change will only substantiate if we make an effort to re-imagine and re-engineer judiciary and court processes through technological application, reforms in substantive justice along with relevant data analysis related to selected procedural legislations ensuring their practicality and feasibility.

For efficiency of administration of any significant reform, finance and budgeting play an important role and nothing fits better than a judiciary that works on the basis of a well-defined financial plan based on collected relevant statistical data and its analysis. This will ensure true judicial independence where the budgetary allocation would fall in line with the litigation expenses and change in the workload of judiciary with every new procedural legislation formulated or amended by the parliament. Even, as we have noted above, existing relevant legislations also fall into this perspective.

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<sup>19</sup>National Judicial Data Grid, Press Information Bureau, Government of India, Ministry of Law & Justice, available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=94951> (last modified on April 23, 2013)>.

With the aid of national judicial data grid which is a work in progress, we can definitely make a step to solve the crisis of allocation of resources, deploying these limited resources in a planned manner in accordance with this socio-legal research tool.

On the lines of National Judicial Academy in Bhopal, there was already a suggestion by the task force on Judicial Impact Assessment to create a body that would deal with Judicial Impact Assessment at both the national and state level. The task force recommended a National Judicial Impact Office in Delhi which would assess the impact of central legislations coming under the Union and Concurrent List being presided over by a sitting judge of the Supreme Court appointed by the Chief Justice of India and comprising of a governing body. This body would consist of Secretaries of The Department of Justice, Finance and Law Secretary.

Further a similar judicial impact office was proposed for each state and union territory to assess the State Legislation coming under the state and concurrent list being presided over by a sitting judge of the High Court appointed by the Chief Justice of High Court and comprising of a governing body. This body would consist of Secretaries in Charge of the Courts, Finance and Law Secretary.

There was the suggestion that the administrative head in these offices would be the Secretary to Government of India in case of national level and Secretary to the State at the state level and further a permanent staff comprising of social scientists, lawyers, experts and statisticians and academicians. This would also involve expert opinion from outside bodies, NGOs and other relevant institutions<sup>20</sup> having knowledge in social science, statistics, law and judicial administration.

## 7. CONCLUSION

In Hussainara Khatoon Case<sup>21</sup>, the Supreme Court stated thus: “Article 39-A provides that Right to free legal aid or free legal service is an essential fundamental right guaranteed by the Constitution which forms the basis of reasonable, fair and just liberty under Article 21.”<sup>22</sup>

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<sup>20</sup> National Judicial Data Grid, Indian Statistical Institute are among others.

<sup>21</sup> (1980) 1 SCC 81 at 89

<sup>22</sup>Centre for Research & Planning, Supreme Court of India New Delhi,” Subordinate Courts of India: A Report on Access to Justice 2016” 1 (2016). Footnote 1.

The judiciary in India is operating under a constant struggle with increasing workload at the state level, financial resources and strength of judges. Judicial independence is important and so is relevant statistical analysis in correlation to this such as an assessment of human development index, literacy rate, unit based method, increase in the number of cases and assessing the availability of judicial services in reference to these classes of cases or in the geographical perspective.

“A Constitution Bench of the Supreme Court in Transfer Petition (C) No. 1343 of 2008 entitled as Anita Kushwaha V. Pushap Sudan in its judgement dated 19.07.2016 identified four aspects that constitute the essence of access to justice. The four aspects are:

- (i) the State must provide an effective adjudicatory mechanism;
- (ii) the mechanism so provided must be reasonably accessible in terms of distance;
- (iii) the process of adjudication must be speedy; and
- (iv) the litigant’s access to the process must be affordable.”<sup>23</sup>

The same has been suggested in National Court Management Systems Committee<sup>24</sup>.

Apart from this, a look at the staff position of subordinate courts is dismal. There is a lack of proper infrastructure availability as well along with this shortage of court and secretarial staff as demonstrated below:

As against the total sanctioned strength of 20,558 judicial officers, 15,540 court rooms are available i.e. publicly owned as on 31.12.2015. The shortfall in infrastructure is 5,018 or 24.41%.<sup>25</sup>

The important question is, how do we address these concerns of lack of infrastructure, lack of judicial staff, lack of judges and inappropriate resource allocation?

As suggested above, many statistics are already coming into play to assess the picture. Whether it is unit based system or demographics to assess the number of judges, the infrastructure or staff or is it a comparative analysis of these heads under the context of other countries, we are already operating with numbers and data. This data is vast, scattered and rarely interpreted.

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<sup>23</sup>*Ibid.*

<sup>24</sup>*Id.* Appendix BB.

<sup>25</sup>*Id.* at 5

If this data is thus, analysed, formalized and systematically assessed to figure out a distinct path for judicial resource and budgetary allocation on the precincts of a well-defined plan, it will a path set as judicial impact assessment, which would mean that the data so developed is used to formulate a plan of action.

It is the right of the citizens of India to know how the judiciary is operating with the cases brought under its jurisdiction and the transparency in the systems is a major requirement which has frequently been questioned. The judicial workload has been tremendously increasing and so has been the rate of disposal but the same is not in line with the ratio wise comparison of both the data, which shows wide variability. Thus, the citizens would know, with the help of an appropriate data structure about the workload of judiciary, the flow of cases, with every new legislation and this would definitely help to elevate the position and status of judicial institutions in our country.

Judicial impact assessment is a statistical tool which uses mathematical means to interpret statistical data such as the number of litigations for every new/amended legislation, the advocates involved, the number of judges in the case, the case being of civil or criminal nature and the staff requirements along with court rooms, all these information collected at the time of inception of cases would become an important means to address the problem of judicial arrears.

A structured and conscious effort to judicial planning based on this comprehensive data would open wide possibilities for Indian judiciary if the same is based on above statistical analysis, related projections and graphical representation. Just like corporate management, judicial management systems are also very determinative to our proposed approach. Shared goals, response to particular issues and allocation form the basis for budgetary planning. These form the vitals of court planning as was proposed by Theodore J. Fetter<sup>26</sup>. It is important to note that the courts must maintain a record of all the statutes to be enforced by the executive. This is important to assess the judicial impact of such legislations along with substantial changes to be necessarily made in the way such data is collected.

The problem of court arrears is nothing new. The number of judges as to the number of cases is a highly imbalanced ratio. The judicial infrastructure is dismal as the number of courts is insufficient

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<sup>26</sup> Theodore J. Fetter, "Planning for Court Management" in Steven W. Hayes, Cole Blease Graham (eds.), *Hand Book of Court Administration and Management* 484-495 (CRC Press, 1<sup>st</sup> edition/ 22 December 1992).

from the lenses of arrears of cases. The number of filings is disproportionately more than the rate of disposal. The issue of pendency is grave and the number of courts is insufficient.

On an analysis of 1985 to 2003 we find that cases have increased faster than the increase of judicial officers. For instance, the increase in cases between 1985 and 2003 is 84% while the increase in the judicial officers during the same period was (from 9,232 to 13,000) has been only 40%. <sup>[5]</sup>

The recent trend in 2019 of pendency has already been discussed in the above text and as we notice, the situation has only dismally improved while the subordinate courts seem still to have a long way to go to reach a substantial increase in rate of disposal proportionate to the rate of pendency.

From 2010 to 2015, the funds in the judiciary, funds of 1010 crore were utilised instead of the initial allotment of 5000 crore which is a mere 20%<sup>27</sup>. The reason for such abysmally low figure requires an analysis. This might be with regard to low operational efficiency and capital expenditure on the part of judiciary.

Thus, is important for us to now analyse the necessity of Judicial Impact Assessment in light of the above developments and know why it is requisite and necessary for us to have a necessary framework to assess this workload change. In case of procedural law changes, we must take into perspective two types of approaches viz. forecasting based on macro level data and the other being the development of litigation models based on game theoretical approach.

Thus, the feasibility and the relevance of Judicial Impact Assessment must be assessed in the Indian context. In light of the Constitution of India, the financial resource base and infrastructure availability, we must assess whether judicial impact is indeed the solution of the problem of the judicial

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<sup>27</sup> Department of Justice, Ministry of Law and Justice. 2015 ‘Thirteenth Finance Commission (TFC) Award (Status, as on 31st March, 2015)’, *available at* : <http://doj.gov.in/sites/default/files/TFT-Award-Status-31.03.2015.pdf> (last visited on 9 October 2019)>.

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